



April 19, 2013

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Office of Engineering and Technology Releases and Seeks Comment on
Updated OET-69 Software, ET Docket No. 13-26, GN Docket No. 12-
268, Notice of Ex Parte Communication

Dear Ms. Dortch,

On Wednesday, April 17, 2013, Rick Kaplan and Jane Mago of the National Association of Broadcasters ("NAB") and Miguel Estrada of Gibson, Dunn & Crutcher, LLP, met with the following individuals at the Federal Communications Commission ("FCC" or the "Commission"): Julie Knapp, of the Office of Engineering and Technology ("OET"); Gary Epstein of the Incentive Auctions Task Force; and Sean Lev and William Scher of the Office of General Counsel.

The purpose of the meeting was to discuss NAB's legal concerns as expressed in its comments and reply comments in the captioned proceeding relating to OET's Public Notice DA13-138 (Feb. 4, 2013), announcing a number of material changes to OET Bulletin No. 69 ("OET-69") to be applied in the context of the upcoming incentive auction. NAB emphasized that its primary goal is to see the Spectrum Act¹ faithfully implemented and the Commission successfully conduct the world's first-ever incentive auction. NAB stated its belief that pursuing the changes to OET-69 at this time would invite unnecessary delay and create widespread uncertainty in progress toward that goal.

¹ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 125 Stat. 156 (2012) ("Spectrum Act").

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Specifically, NAB argued that the changes announced in the Public Notice modify the methodology used in OET-69 and thus violate Congress's clear direction in the Spectrum Act. Section 6403(b)(2) of the Act states:

In making any reassignments or reallocations . . . , the Commission shall make all reasonable efforts to preserve, as of the date of the enactment of this Act, the coverage area and population served of each broadcast television licensee, *as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology* of the Commission.²

Congress plainly intended the Commission to apply OET-69 *as it existed at the time of the legislation's enactment*. In addition, NAB noted several procedural issues such as the nature of the notice and the need for a Commission-level decision to make the types of changes announced in the Public Notice.

In response to suggestions that the announced changes were intended to improve the accuracy of the FCC's calculations of the coverage area and population served by broadcast stations, NAB noted first that its analysis demonstrated that the changes in fact produce less accurate results.³ NAB further questioned why, even assuming the changes implemented improved the accuracy of OET-69, the Commission would only implement them in the incentive auction context. Indeed, if the changes are implemented, the result would be that on the very same day that the auction is commenced using the altered OET-69, a person or entity could file an application for a new television station, yet be required by the Commission to use the supposedly less accurate OET-69. Such a result is plainly arbitrary and capricious. Any changes to improve the accuracy of OET-69 should be fully vetted and accomplished in a general rulemaking.

² Spectrum Act § 6402(b)(2), (emphasis added).

³ See Comments of the National Association of Broadcasters, *et al.*, in ET Docket No. 1316, GN Docket No. 12-268 at 22-23 (filed March 21, 2013); see *also* Reply Comments of the National Association of Broadcasters, *et al.*, in ET Docket No. 1316, GN Docket No. 12-268 at 7-14 (filed April 5, 2013).

NAB emphasized that its analysis of the changes showed that they would yield little benefit for the auction and would create significant uncertainty for broadcasters. NAB made clear that it does not, in any way, disagree that it could be fruitful to have a thorough review of OET-69 sometime in the future. NAB stated, however, that such a reexamination is not appropriate or wise in the middle of an extremely complex proceeding even if the Commission had authority to revise OET-69 for purposes of the incentive auction. Pursuing changes to OET-69 now creates substantial uncertainty for broadcasters and the wireless industry. Whereas prior to the Public Notice, broadcasters understood how their coverage area and population served would be calculated in the auction and repacking, as a result of these changes, no broadcaster could know what it would be auctioning or preserving. The changes could yield a greater protected area for some stations and less for others. The resulting instability in the process will undermine the auction that NAB and other industry players are giving their best efforts to make work as Congress intended.

NAB concluded by repeating its willingness to work with the Commission toward a successful auction, but again urged the agency to put aside any desired changes to OET-69 in the context of the auction.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Rick Kaplan', with a long horizontal flourish extending to the right.

Rick Kaplan
Executive Vice President, Strategic Planning
National Association of Broadcasters

cc: Julie Knapp, Gary Epstein, Sean Lev, William Scher.